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No. 82 - 994

ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT WELCH, INC.,

Petitioner,

VS.

ELMER GERTZ,

Respondent.

On Petition For Writ Of Certiorari To The United
States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Virtually none of the Questions Presented as posed by Petitioner herein were raised in the Courts below. Furthermore, the questions presented by Petitioner are not based upon the record as actually made below, but upon a distorted and biased view of the evidence in this case, as well as a distorted view of the opinion of the Court of Appeals to which this Petition for Writ of Certiorari is directed.

The following are the questions actually presented in this case:

1. Whether Petitioner has waived the right to raise the issues set forth in its Petition for Writ of Certiorari by either failing to raise them in the Courts below, or by taking a directly opposite position below to that taken before this Court.

2. Whether the self-serving statements of a defendant may insulate it from liability in a defamation case where the objective evidence shows that any person would have had reason to doubt the veracity of the damaging and harmful statements made by a publisher in undue haste after having conceived the story line itself, carefully selected an author known for his propensity to label persons as Communists or Communist-fronters and then furnishing the author with information to be used as the basis for the story.

3. Whether a publisher may be held to be responsible for the writings of an allegedly free-lance author whose writings it has published regularly for several years, and for whose honesty and accuracy it specifically endorses without any basis for doing so.

4. Whether the evidence supports the findings below that a publisher who accuses a person of a crime and of having a criminal record may avoid liability by purporting to cloak those accusations in political hyperbole.

5. Whether Respondent's evidence was sufficient to support the jury's verdict, as upheld by the District Court and the Court of Appeals that Petitioner was guilty of both negligence and actual malice.

6. Whether this Court intended to foreclose Respondent from proving actual malice on the part of Petitioner when it remanded this cause for a new trial in its prior decision herein.

TABLE OF CONTENTS

| | Page |
|---|------|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| STATEMENT OF THE CASE | 1 |
| ARGUMENT: | |
| I. | |
| Defendant Has Waived Its Right To Raise The Issues Presented To This Court | 7 |
| II. | |
| Defendant Was Guilty Of Actual Malice | 8 |
| III. | |
| The Author's Conduct Was Properly Con- sidered | 10 |
| IV. | |
| The Article At Issue Is Defamatory | 11 |
| V. | |
| There Was Ample Proof Of Injury To Plain- tiff | 12 |
| VI. | |
| Plaintiff Was Entitled To Prove Actual Malice | 13 |
| CONCLUSION | 14 |

TABLE OF AUTHORITIES

| <i>Cases</i> | <i>Page</i> |
|---|-------------|
| Gertz v. Robert Welch, Inc., 306 F. Supp. 310 (N.D. Ill. 1969) | 11 |
| Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997 (1974) | 1 |
| In re Staff Mortgage and Investment Corp., 625 F.2d 281, 283 (9th Cir. 1980) | 13, 14 |
| New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964) | 2 |
| Peterson v. Federated Development Co., 416 F. Supp. 466, 473 (S.D.N.Y. 1976) | 13 |
| Pstragowski v. Metropolitan Life Ins. Co., 553 F.2d 1 (1st Cir. 1977) | 7 |
| St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323 (1968) | 9 |

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STATEMENT OF THE CASE

This Court has previously rendered an opinion in this case. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997 (1974). There, this Court held that Plaintiff was not a public figure, but a private individual. The Court also held that the individual states were free to define for themselves the appropriate standard of liability for a publisher of defamatory falsehoods injurious to a private individual so long as they do not impose liability without

fault, but that in order to obtain punitive damages, the plaintiff will be required to show actual malice as defined in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964). *Id.* at 348, 94 S.Ct. at 3010.

In its prior opinion, this Court recognized that the actual injury for which Plaintiff could recover damages was not limited to out-of-pocket loss, but included impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. *Id.* at 351, 94 S.Ct. at 349. This Court has already recognized that the article and reprint thereof at issue in this case falsely accused the plaintiff of having committed crimes, having had a criminal record and being a Leninist and a Communist fronter, as well as other highly derogatory things and that it was defamatory. The Court also recognized that there were serious and harmful inaccuracies in the statements regarding Plaintiff in that article.

The Court concluded its opinion as follows:

"We therefore conclude that the *New York Times* standard is inapplicable to this case and that the trial court erred in entering judgment for Respondent. Because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury, a new trial is necessary. We reverse and remand for further proceedings in accord with this opinion." *Id.* at 353, 94 S.Ct. at 3013.

After the remand from this Court, Plaintiff filed an amended complaint in the District Court in accord with this Court's prior opinion, alleging that Defendant was guilty of both negligence and actual malice, specifying, among other things, that the defendant had made no effort whatsoever to check the accuracy of any of the highly damaging statements made about him prior to publication, although it had more than ample time to do

so, since American Opinion is a monthly publication, and that it was in an excessive hurry to publish and distribute the article and reprint thereof; Defendant's managing editor vouched for the accuracy of the article although he had no knowledge upon which to base such an assertion and should have been alerted to investigate because of the nature of the charges; Defendant's managing editor himself placed defamatory captions in the article; and Defendant continued to distribute the reprints in the magazine itself containing the article after this suit was instituted and after it had been put on notice of the falsity of the statements within it. Plaintiff prayed for both compensatory and punitive damages. Defendant did not oppose or object to this amendment in any way.

After remand, at the District Court level Defendant never objected to Plaintiff introducing evidence of actual malice on its part. To the contrary, Defendant filed a Motion for Summary Judgment prior to trial, attempting to demonstrate that Plaintiff would be unable to prove actual malice as a matter of fact at trial. It did not contend that Plaintiff was precluded from offering evidence on the issue, only that there were insufficient facts available to establish actual malice. At no time either prior to or during the second trial of this cause, did Defendant contend that Plaintiff was foreclosed from proving actual malice. Nor did Defendant raise the issue in its post-trial motion. Indeed, during the trial, Defendant urged that Plaintiff was required to prove actual malice and expressly urged the court to instruct the jury that Plaintiff bore this burden. (Tr. 637, 639)

The evidence introduced at the second trial went far beyond that introduced at the first trial of this cause. There were additional important witnesses, and those who testified a second time greatly expanded their testimony. Alan Stang, author of the article, testified ex-

tensively at this trial, whereas he had not testified at all at the first trial. He admitted having written that the Democratic Party of the United States is a Marxist organization and that Hubert Humphrey, Pierre Trudeau, Richard Nixon, Dr. Martin Luther King, Jr., John F. Kennedy, Lyndon Johnson, John Foster Dulles and U Thant were all Marxists or working for the Communists. (Tr. 205, 211-12, 216-17, 418) He further stated that when he was first contacted by Scott Stanley, the managing editor of Defendant, it was Stanley who told him that Officer Nuccio, about whom the article was being written, was being railroaded for murder and asked him to go to Chicago to research and write about the matter to demonstrate this. Stanley supplied Stang with a package of material on Communist attacks on the police before Stang began to research and write on the article. As the opinion of the Court of Appeals states, Stanley conceived of the story line and solicited a writer with a known and unreasonable propensity to libel persons or organizations as Communists to write the article and never made any effort whatsoever to check the accuracy of the defamatory statements made by Stang.

Stang admitted that he never checked any of his charges against Plaintiff with anyone having knowledge of the facts. He did not even question Nuccio's attorneys or the Plaintiff about them. In fact, he admitted that despite his charges against Plaintiff he actually knew that Plaintiff had nothing whatsoever to do with the criminal prosecution of Richard Nuccio. (Tr. 607).

Scott Stanley again testified, admitting that he rushed the article into print within three hours after having received the manuscript from Stang, contrary to the usual procedure which took days. He claimed that he

relied solely upon Stang for the matters stated in the article, but he personally wrote the accusatory title, the defamatory captions for the photographs and personally and on behalf of the Defendant claimed Stang to be their own and vouched for the accuracy of Stang's "facts" although he had absolutely no knowledge of whether they were true or not. (Tr. 116) There were many reasons why Stanley should have been alerted to the defamatory falsehoods in the article. For example, Gertz had been director of public relations for the Illinois Police Association, as disclosed in the material in Defendant's possession. Both Stang and Stanley admitted at trial that they fully intended to depict Plaintiff in a bad light.

Several persons well-acquainted with Plaintiff testified at this second trial, each stating that to accuse an attorney of being affiliated with Communists and conspiring to frame an innocent man for the crime of murder would inevitably damage his reputation. In addition, the plaintiff himself testified that as a result of this article, he was shocked, deeply upset, worried about the effect of the article, knocked out emotionally, anguished, humiliated and embarrassed. He testified that he became obsessed with the article and devoted countless hours to trying to rehabilitate himself and redeem his reputation. (Tr. 290, 291, 306 and 307) He felt physically and emotionally ill at ease and took tranquilizers as a result of this article. (Tr. 314, 349)

The jury returned a verdict in favor of Plaintiff in the amount of \$100,000.00 actual damages and \$300,000.00 punitive damages. Judgment was entered on that verdict.

The only issues raised in Defendant's post-trial motion were that the Court had confused the standards of negligence and actual malice; there was insufficient evidence to prove negligence, malice or actual damages; it was

error to allow Plaintiff's counsel to argue that the statements made about Plaintiff were untrue; the damages were excessive; and the Court improperly allowed the jury to read the article at issue prior to final deliberations. The trial court denied this motion in every respect and refused to grant a remittitur.

In a lengthy and scholarly opinion, the United States Court of Appeals for the Seventh Circuit affirmed the judgment in favor of Plaintiff in all respects after considering in depth all of the contentions and arguments raised by Defendant. The Court of Appeals specifically endorsed many of the findings of fact below, all based upon the record and all justifying the jury's verdict. Defendant now seeks to contradict these findings on the basis of its own distorted version of the facts which was rejected by the jury and both courts below. For example, Defendant persists in referring to Stang as a freelance writer, despite the fully supported finding that he was, in fact, the agent of Defendant, which is therefore bound by his conduct and numerous writings for it.

ARGUMENT

I.

DEFENDANT HAS WAIVED ITS RIGHT TO RAISE THE ISSUES PRESENTED TO THIS COURT

None of the issues which Defendant purports to advance to this Court were raised at the trial court level. One, pertaining to the law of the case, was raised for the first time before the Court of Appeals and decided adversely to Defendant. The rest are presented to this Court for the first time. Thus, the threshold issue in this case now is whether Defendant has any right to present new issues to this Court which were not raised in more than thirteen years of litigation. It is one of the basic rules, founded upon both common sense and judicial economy, that a party may not raise for the first time on appeal a ground not presented at the trial level. *Pstragowski v. Metropolitan Life Ins. Co.*, 553 F.2d 1 (1st Cir. 1977)

A party may not allow the case to be submitted to the jury on one theory and then object to it as a new ground on appeal. For this reason, it has long been required that all contentions first be raised at the trial level. None of the issues which Defendant purports to raise were ever presented to the District Court. Having failed to do so, Defendant is now precluded from asking this Court to consider matters which were never presented to the courts below. The Petition filed here by Defendant is the last desperate act of a guilty defamer to prolong litigation which is already much too old.

In addition, nothing presented in Defendant's Petition for Certiorari demonstrates that there are any special and important reasons for granting the Writ as required

under this Court's Rule 19. There is no demonstration that the opinion of the Court of Appeals in this case is in conflict with the decision of another Court of Appeals or with any decision of this Court. Indeed, it is in conformity with such decisions. Nor are there any important novel questions raised in this case which have not already been adequately explored and authoritatively decided by this Court. The facts and the law are overwhelmingly in Plaintiff's favor.

This Court should deny the Petition for Certiorari.

II.

DEFENDANT WAS GUILTY OF ACTUAL MALICE

Defendant's argument that the Court of Appeals applied the wrong standard of actual malice is totally without foundation. Defendant argues as if the Court of Appeals decided the issue of actual malice for the first time. Defendant completely ignores the fact that the jury was instructed that the burden was upon Plaintiff to prove actual malice by clear and convincing evidence. Actual malice was properly defined to the jury in those instructions. Defendant at no time objected to the instructions given to the jury, either at trial or thereafter. Thus, the opinion of the Court of Appeals did nothing more than to affirm the finding of malice by the jury which was instructed properly on that issue and heard more than sufficient evidence to justify its finding of malice.

Defendant's argument that this Court has mandated that actual malice must be judged by a subjective standard alone is a perversion of the holdings of this Court. It has never endorsed the approach submitted by Defendant here. To do so would allow every defamation defendant to insulate itself from liability by merely stating in conclusory language that it had reason to believe the truth of

the matter and had no information that the defamatory material might be false. In fact, this Court rejected such an approach in *St. Amant v. Thompson*, 390 U.S. 727, 732, 88 S.Ct. 1323, 1326 (1968), where it said:

"The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Profession of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

As set out at great length by the Court of Appeals in its opinion, Defendant falls squarely within this caveat. The story was fabricated, based wholly on unverified anonymous information, and so inherently improbable that only a reckless man would have put it in circulation. The facts of this case as proved at the trial show an egregious violation of Plaintiff's rights by this Defendant. Nothing in the opinion of the Court of Appeals contravenes this Court's prior holdings.

There are no issues of import in regard to the standard of actual malice utilized by the courts below in this case. In short, Defendant is merely asking this Court to review the weight of the evidence and to reach a finding in opposition to that of the jury, the District Court, and the Court of Appeals. No purpose would be served in doing so when it is obvious that the finding of actual malice is more than amply supported by the evidence in this case.

III.

**THE AUTHOR'S CONDUCT
WAS PROPERLY CONSIDERED**

Defendant next complains that the Court of Appeals improperly attributed the conduct of the author to the Defendant. This argument is based upon a deliberate distortion of the opinion of the Court of Appeals. While footnote 19 of the opinion of the Court of Appeals recognizes that the conduct of the author is attributable to the Defendant because, among other things, it solicited him to write the article, gave him its conclusion in advance and gave him the storyline and background material, that is not the only basis for the finding that Defendant was guilty of actual malice. The court specifically finds that the Defendant, through the actions of its managing editor Stanley, was itself guilty of actual malice. All of this is spelled out in persuasive detail in the Court of Appeals opinion and was amply proved at the trial.

The Court of Appeals recognized, as the jury found, that Stanley had obvious reasons to doubt the veracity or accuracy of the author of the highly defamatory statements, originated the idea and central theme of the article, and provided material which found its way into the article. Furthermore, Stanley himself admitted that he had no basis at all upon which to support his personal and corporate endorsement of the truth of the material contained in the article written by his man. In fact, he had reason to know that Stang, regardless of the facts, would brand anyone about whom he wrote a Communist, due to his long association with and prior editing of similar articles written by Stang. Indeed, the evidence in this case provides a textbook example of reckless disregard of the truth by both author and publisher.

The opinion of the Court of Appeals fully discusses that evidence and need not be reviewed by this Court.

IV.

THE ARTICLE AT ISSUE IS DEFAMATORY

In arguing that the article here is not defamatory, Defendant completely ignores the prior holding of this Court in this case and the very language of its charges against Plaintiff. That the article involved herein is defamatory is truly the law of the case. At the very beginning of this case, Defendant moved to strike the complaint on the grounds that the statements contained in the article at issue were not defamatory. In the very first of several published opinions in this case, the District Court held that the statements made about Plaintiff "impute to him a want of the requisite qualifications to practice law . . . and are therefore actionable per se." *Gertz v. Robert Welch, Inc.*, 306 F.Supp. 310, 311 (N.D. Ill. 1969) From that date, until the filing of the Petition for Certiorari in this case, there has been no serious argument made by Defendant that the article herein is not defamatory. That argument has long since been waived. In fact, Defendant's attorney admitted at the first trial that the accusations that Plaintiff was a Communist or Communist fronter were false. Indeed, the prior opinion of this Court herein forecloses that issue from consideration.

The article at issue here did not merely link Plaintiff with some political ideology. Rather, it accused him, among other false and defamatory charges, of having had a criminal record and having participated in the crime of causing an innocent person to be convicted of murder.

If one issue has been clear since the beginning of the long and tortuous process of this suit, it is that the article at issue is defamatory of the Plaintiff. It cannot seriously be contended at this late date, after two trials and three appellate opinions, that the case should have been dis-

missed in the first place. No issue whatsoever is presented regarding the false and defamatory nature of the accusations against Plaintiff which would justify this Court's consideration of such a basic issue in this case at this late date, more than thirteen years after the filing of suit and the holding of two trials and three reviews thereof.

V.

**THERE WAS AMPLE PROOF OF
INJURY TO PLAINTIFF**

In arguing that Plaintiff has proven no actual injury, the Defendant completely ignores the holding of this Court in its prior opinion herein. The evidence presented of the actual damage suffered by Plaintiff as a result of this article specifically tracks such damages in the manner and substance found to be proper and appropriate by this Court. As set forth in the Statement of the Case and found by the Court of Appeals, the Plaintiff testified eloquently as to the personal anguish, humiliation, pain, suffering and physical effects of this article upon him. Several attorneys, long active in leadership roles at the Bar, testified that the statements made about Plaintiff were bound to cause serious damage to Plaintiff's reputation. Indeed, there was direct testimony by Mr. Albert Jenner that he had personal knowledge of the damage to Plaintiff's reputation including the repetition of the libel.

There is no issue worthy of consideration by this Court regarding the nature of the proof of actual damage suffered by Plaintiff as a result of the actions of this Defendant.

VI.

**PLAINTIFF WAS ENTITLED TO PROVE
ACTUAL MALICE**

Defendant renews here its unmeritorious contention, raised in the Court of Appeals for the first time, that the law of the case precluded Plaintiff from presenting evidence of actual malice at the second trial of this cause. This argument is premised upon the finding by this Court in its prior opinion in this case that Plaintiff had not proven actual malice at the first trial. Be that as it may, it is obvious that had this Court intended to hold that Plaintiff had no opportunity to do so at a retrial of this cause, the case would not have been remanded for a new trial. It is logical that if this Court intended to hold that Plaintiff could never prove actual malice, whatever the evidence, it would not have reversed and remanded the case for a full trial, but would have included in its mandate a statement that only actual damages could be recovered at retrial. No such holding was made. Indeed, the Court set forth specific guidelines as to how actual malice was to be proven, for guidance at the retrial of the case. It is clear from this Court's prior opinion that the matter was sent back for a complete trial of all issues under the new guidelines set forth by it for the first time. As a result, Plaintiff made appropriate amendments to his complaint as to both negligence and actual malice and offered an abundance of evidence to support those allegations, going far beyond the evidence offered at the first trial.

Furthermore, Defendant has completely misconstrued the doctrine of law of the case. That doctrine applies only to issues of law which have previously been determined, not to issues of fact. *Petersen v. Federated Development Co.*, 416 F.Supp. 466, 473 (S.D.N.Y. 1976), *In Re Staff Mortgage and Investment Corp.*, 625 F.2d 281, 283 (9th

Cir. 1980). Thus, the doctrine upon which Defendant relies clearly does not apply to this situation, as the Court of Appeals correctly found.

This Court made no findings of fact in its prior opinion, other than to affirm the finding at the first trial that Plaintiff was not a public figure and that false statements were made about him. All other issues of fact were open for retrial and reconsideration. Defendant so recognized at the trial. Having fully participated in that trial and having argued at the District Court level that Plaintiff was required to prove actual malice, it cannot now do an about face and contend that Plaintiff was foreclosed from proving that which Defendant insisted he must prove.

CONCLUSION

This case presents no issues requiring the attention of this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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